INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statute and regulation involved	2
Statement	2
Argument	7
Conclusion	12
Appendix	13

CITATIONS

Cases:

Annett v. *United States*, No. 4632, C.A. 10, decided June 26, 1953	11
Bowles v. *United States*, 319 U.S. 33	10
Cox v. *United States*, 332 U.S. 442	11
Estep v. *United States*, 327 U.S. 114	11
United States v. *Nugent*, 346 U.S. 1	7, 8

Statutes and Regulations:

Selective Service Act of 1948 (62 Stat. 604):	
Section 6(j) (50 U.S.C. 456(j))	9, 13
Section 12(a) (50 U.S.C. App., Supp. V, 462(a))	2, 13
Universal Military Training and Service Act of June 19, 1951, Section 1(q) (65 Stat. 75, 86, 50 U.S.C. App., Supp. V, 456(j))	13
Selective Service Regulations:	
32 C.F.R. (1949 ed.):	
Part 1626.25	15
Part 1632.14(b)(5)	2

In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 249

LEVI DAL SANTO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 105-112) is reported at 205 F. 2d 429.

JURISDICTION

The judgment of the Court of Appeals was entered on June 25, 1953 (R. 112-113) and a petition for rehearing was denied on July 20, 1953 (R. 114). The petition for a writ of certiorari was filed on August 10, 1953. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether a person who claims exemption from military service as a conscientious objector is entitled to examine, or have included in the record, an F.B.I. report submitted to the Department of Justice officer hearing his claim.

2. Whether, on the facts, petitioner's claim for exemption as a conscientious objector was properly rejected.

STATUTE AND REGULATION INVOLVED

The pertinent portions of the Selective Service Act of 1948 and regulations issued thereunder are set forth in the Appendix, *infra,* pp. 13-16.

STATEMENT

On March 25, 1952, a one-count indictment was returned in the United States District Court for the Northern District of Illinois charging petitioner with knowingly failing and refusing to submit to induction into the armed forces, in violation of Section 12(a) of the Selective Service Act of 1948, 62 Stat. 604, 50 U.S.C. App., Supp. V, 462(a), infra, p. 13, and Selective Service Regulation 1632.14(b)(5) (R. 6-7). Having waived a jury (R. 5), petitioner, after trial, was found guilty as charged and sentenced to two years' imprisonment. (R. 13-14.) The Court of Appeals for the Seventh Circuit unanimously affirmed the conviction (R. 105-113).

The evidence to support the judgment may be summarized as follows:

Petitioner registered under the Selective Service

Act on September 18, 1948, in Chicago, Illinois, and on his registration card, listed his occupation as that of a structural iron worker (Gov. Ex. 1-A-L, R. 48-49). On September 22, 1950, he was mailed a questionnaire form (Gov. Ex. 1-S, R. 50-54) which he executed and returned. Under Series VI of this form (R. 51), petitioner indicated that he was, and had been since October 10, 1949, a minister of the Jehovah's Witnesses' faith. He also stated that he had been formally ordained as such on August 3, 1950.[1] He indicated, however, under the section calling for his present occupation, that he had been employed as a repairman for a television company on August 20, 1950, and that he had entered into this employment in July (R. 52).

There is a section of the questionnaire denominated Series XV in which conscientious objectors indicate their claim to such status and apply for a special form (SSS Form No. 150) which they must execute and return to their local board to be considered for such status. Petitioner failed to execute this section or procure the form at this time (R. 53).

He stated that in his opinion his classification should be Class 4-D, the exempt classification for ministers (R. 53).

Petitioner submitted together with his questionnaire, affidavits of other Jehovah's Witnesses to the effect that he was enrolled in a Theocratic ministry school in Chicago, that he preached from house to

[1] Other evidence in the file indicates that this "ordination" consisted of being baptized into the Jehovah's Witnesses' faith (R. 55, 58, 76, 81, 83-84).

house and on street corners, and that he had given Bible discourses at the school (R. 58-70).[2] In his own statement petitioner indicated that he attended Theocratic Ministry School only on Friday evenings and listed other activities which he believed would qualify him as a minister. He also stated that being a minister he could not leave this occupation to engage in "carnal warfare" and to do so "would mean death at the hands of Almighty God" (R. 71).

On October 12, 1950, petitioner was classified 1-A on the basis of the papers in his file (R. 23, 54, 96). Thereafter, on October 26, 1950, he requested a hearing on his claim of being a minister (R. 25, 72). On March 27, 1951, he appeared for physical examination (R. 23, 29) and on April 4, 1951, he was found physically acceptable for induction (R. 54).

On March 26, 1951, one day before he reported for his physical examination, his local board received an executed conscientious objector form (SSS Form No. 150) from him (R. 25, 29, 73-81). On this form he again set forth his claim that, as an ordained minister in Jehovah's Witnesses, he could not leave his occupation as such and "assume the obligations of a soldier in any army of this world without being guilty of desertion and suffering the punishment meted out to deserters by Almighty

[2] Although the affidavits give the general impression that petitioner was regularly engaged in giving "Bible sermons" or "discourses on the Bible" at the school, the affidavit of the Bible Study Servant in his unit indicates that he had only given "two student sermons" (R. 58-59).

God" (R. 79). In a letter dated March 28, 1951, he wrote a letter to the board seeking to clarify his claim in which he stated, *inter alia* (R. 81-82):

> After supplying you additional proof and information through form SSS form 150, toward the sincerity of my ministerial status, I trust you will grant me according to laws of Selective Service Act of 1948 Section 6(j), the proper classification of a Minister of religion which is IV-D. * * *

On April 7, 1951, petitioner again asked for a hearing to prove that he was a minister and therefore exempt from military service (R. 82-83). He expressly based his claim in this letter on his contention that he was a "Regular or duly ordained minister of religion" within the meaning of Section 5(d) of the Selective Training and Service Act of 1940, and therefore was entitled to a 4-D classification. On April 19, 1951, he appeared before his local board pursuant to his request (R. 27, 33).

On the trial of this case the secretary of petitioner's local Selective Service Board testified that petitioner was questioned for at least 20 to 25 minutes in the board's hearing room at the time of his hearing (R. 39, 41, 42). The witness testified that petitioner seemed vague on how much time he spent as a minister but stated that most of his time was spent as a radio and television repairman. On being asked how long he had been a conscientious objector, he referred to his conscientious objector questionnaire. The board considered petitioner's

claim as a conscientious objector and rejected it. The witness testified that he formed an opinion adverse to petitioner's claim on the basis of his oral testimony. (R. 39-40.)

Petitioner testified at the hearing that he told the board that his appearance was for the purpose of proving that he was a minister and that he did not discuss his conscientious objector's status with the board (R. 33-34, 36). He further testified that the hearing lasted only two or three minutes (R. 33).

The board voted to retain petitioner in classification 1-A on April 19, 1951 (R. 54).

On April 21, 1951, two days after the hearing, petitioner wrote a letter to the State Headquarters of the Selective Service System in which he objected to the local board's hearing, and he characterized his claim as one for exemption as a minister under Section 6(j) of the Selective Service Act of 1948 (R. 83-85). He was informed in reply as to the procedure for appealing his classification (R. 85-86), which he followed, noting an appeal on May 15, 1951 (R. 86-87).

The Appeal Board forwarded petitioner's file to the Department of Justice, and an investigation was conducted by the Federal Bureau of Investigation. The departmental hearing was conducted on September 20, 1951, and the hearing officer recommended that petitioner be classified 1-A. (R. 87-94.) Although the report of the hearing states that (R. 94) "an exhaustive investigation by the Federal Bureau of Investigation developed no derogatory facts," nevertheless the hearing officer found

on the basis of the hearing and the record that petitioner's "* * * religious zeal coincides with general discussion of the draft." It was also noted that the date of his questionnaire was September 22, 1950, and that (R. 94) "* * * his religious activities have been so recent, it is not clear that his conscientious objections are based entirely on his religious training and belief." For these reasons the hearing officer concluded that petitioner had not proved his claim.

This recommendation was transmitted to the Appeal Board (R. 95-96), which on December 18, 1951, by a vote of 4 to 0, classified petitioner as 1-A (R. 54).[3] Thereafter on January 18, 1952, petitioner was ordered to appear and submit himself to induction into the armed forces on February 5, 1952 (R. 97). On that day petitioner appeared at the appointed place but refused to submit to induction (R. 30-31, 34).

ARGUMENT

1. Petitioner's contention that his right to procedural due process was violated by the failure of the Department of Justice to furnish him and include in the file a copy of the F.B.I. report which was submitted to the hearing officer (R. 15-18) has been resolved against him by the decision of this Court in *United States* v. *Nugent*, 346 U.S. 1. The petitioner specifically seeks reconsideration and

[3] Prior to the Appeal Board's final determination, petitioner, on November 23, 1951, wrote to his local board stating that as of November 1, 1951, he had become a "full-time minister" (R. 37).

overruling of that decision (Pet. 15). But no new grounds not previously considered by the Court are presented. It is therefore inappropriate for the Court to reconsider the issue in the present case.[4]

2. Petitioner contends that the rejection of his claim to conscientious objector status by the local board, was based on erroneous standards, and was therefore arbitrary and capricious (Pet. 18-20).

Initially, it is doubtful whether petitioner made an independent claim for classification as a conscientious objector at any time before his local board hearing. He repeatedly characterized his claim as being a claim for exemption as an ordained minister in every document he submitted, and even at the time he submitted the special conscientious objector form (SSS Form No. 150; R. 73-81) he characterized that as "additional proof and information * * * toward the sincerity of my ministerial status * * * " (Gov. Ex. 1-N, R. 81-82). When he requested a hearing before the local board he did so to prove that his proper classification "should be that of a Minister, IV-D" (Gov. Ex. 1-O, R. 82-83). He repeatedly emphasized that his claim to exemption was that he was an ordained

[4] Petitioner also contends (Pet. 26) that the trial court erred in quashing a subpoena to produce on the trial of this case the F.B.I. investigative report "to test the resumé provided for in the *Nugent* decision * * *." This contention misconceives the holding in the *Nugent* case which indicates that the Department of Justice hearing is advisory, and not binding on the Appeal Board, and that the right of the claimant to the material contained in the investigative report is satisfied by furnishing him a resumé of adverse material therein, which did not exist in this case. Petitioner plainly has no right to a full-scale collateral review of the advisory hearing.

minister of Jehovah's Witnesses and having dedicated himself to this calling, he was opposed to deserting this mission for service in the armed forces, believing that to do this would invoke the retribution of the Deity. In short, he did not squarely base his claim in any of the documents of record, on a conscientious opposition "to participation in war in any form" (50 U.S.C., Supp. V, 456(j), *infra*, p. 13) but rather on the purely personal claim that being a minister he could not conscientiously leave his duties as such. Even after his unsuccessful hearing before his local board (in which, according to his testimony, he did not discuss his conscientious objector claim (R. 34)), he appealed on the basis that he was entitled to IV-D classification as a minister, without even mentioning an additional claim as a conscientious objector (Gov. Ex. 1-H, R. 86-87).

The local board, however did treat petitioner's claim as including a demand for conscientious objector status. During the hearing the board took into consideration his special form (R. 73-81), and also his testimony (R. 40). A member of that board testified on the trial that the board members disbelieved petitioner (R. 40-41). In its minutes the local board entered the notation "registrant said he would fight to defend himself" (R. 54). It is reasonable to believe that the holding of the local board therefore was based simply on disbelief of petitioner's last-moment application for consideration as a conscientious objector. Moreover, his claim to exemption as a conscientious objector was

linked to and logically dependent on his claim of being an ordained minister. But that claim was not sustainable since he was merely a part-time student in a Theocratic School, his "ordination" consisted merely of baptism, and he was in no respect a recognized leader or pastor of an organized group of congregants or in charge of administering ordinances of public worship.

Petitioner cites the trial testimony of a local board member who, on being asked what a man would have to be in order to qualify as a conscientious objector, replied (R. 42): "He has to be a full-time minister, a full-time minister of the Gospel and devote most of his time, under the regulations, as a minister." This statement may have resulted from a failure to understand the question, as the court below observed (R. 110), or it may have resulted from the peculiarities of this particular claim which predicated the conscientious objection to service in the armed forces on the claim that petitioner was an ordained minister. In any event, that same witness testified that the board members disbelieved petitioner's claim as an objector (R. 40-41).

Moreover, assuming *arguendo* that the local board's rejection of petitioner's conscientious objector claim was based on an erroneous standard, this does not establish the invalidity of the order of the Appeal Board upon which his final classification (now under attack in this action) was based. The *de novo* action of the Appeal Board completely superseded the local board action (*Bowles* v. *United*

States, 319 U.S. 33, 35) and it is the invalidity of the final order that petitioner must prove.[5]

Petitioner also attacks the recommendation of the hearing officer and the action of the Appeal Board as arbitrary and capricious. Much of the argument on this point merely attacks the inferences to be drawn from the facts adduced and misconceives the limited function of the court under such circumstance of determining whether there was "no basis in fact for the classification." *Cox* v. *United States,* 332 U.S. 442, 448-449; *Estep* v. *United States,* 327 U.S. 114, 122-123.

The hearing officer's recommendation, pointed out that petitioner's "religious zeal coincides with general discussion of the draft" and that his religious activities were so recent that "it is not clear that his conscientious objections are based entirely on his religious training and belief" (R. 94). This does not deny that a person may sincerely acquire conscientious scruples at the very time that a draft board is breathing down his neck, but merely suggests that this petitioner did not meet the burden of establishing that fact in his case. And the Appeal Board in turn, on all the facts before it, in-

[5] The recent opinion of the Court of Appeals for the Tenth Circuit in *Annett* v. *United States,* No. 4632, decided June 26, 1953, cited by petitioner as being in conflict with the opinion below, related purely to the standards employed by the hearing officer, upon which apparently the Appeal Board's final action was based, rather than the action of a local board. It is further distinguishable by the fact that the hearing officer employed such standards as the fact that the claimant did not have (slip op. p. 7) "that humility ordinarily incident to one having that deep, sincere, religion objection to service in our military forces," a standard which was not employed in the instant case.

cluding the timing of petitioner's attachment to the religious sect, cannot be said to have reached an unreasonable decision.

CONCLUSION

The decision of the court below is correct and further review is not warranted. It is respectfully submitted that the petition for a writ of certiorari should be denied.

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SEPTEMBER, 1953.

APPENDIX

STATUTE AND REGULATIONS INVOLVED

1. Section 12 (a), Selective Service Act of 1948, 62 Stat. 622 (50 U.S.C. App. 462(a)) provides:

> Any * * * person * * * who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under or in the execution of this title, or rules, regulations, or directions made pursuant to this title * * * shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment * * *.

2. Section 6(j) of the Selective Service Act of 1948, 62 Stat. 604, 612-613 (50 U.S.C. App., Supp. V, 456(j) provides:[6]

> Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, socio-

[6] As amended by Section 1(q) of the Universal Military Training and Service Act of June 19, 1951 (65 Stat. 75, 86, 50 U.S.C. App., Supp. V, 456(j)), Section 6(j) of the Act of 1948 differs from the original provision quoted in the text in respects which are here immaterial.

logical, or philosophical views or a merely personal moral code. Any person claiming exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board shall, if he is inducted into the armed forces under this title, be assigned to noncombatant service as defined by the President, or shall, if he is found to be conscientiously opposed to participation in such noncombatant service, be deferred. Any person claiming exemption from combatant training and service because of such conscientious objections shall, if such claim is not sustained by the local board, be entitled to an appeal to the appropriate appeal board. Upon the filing of such appeal, the appeal board shall refer any such claim to the Department of Justice for inquiry and hearing. The Department of Justice, after appropriate inquiry, shall hold a hearing with respect to the character and good faith of the objections of the person concerned, and such person shall be notified of the time and place of such hearing. The Department of Justice shall, after such hearing, if the objections are found to be sustained, recommend to the appeal board that (1) if the objector is inducted into the armed forces under this title, he shall be assigned to noncombatant service as defined by the President, or (2) if the objector is found to be conscientiously opposed to participation in such noncombatant service, he shall be deferred. If after such hearing the Department of Justice finds that his objections are not sustained, it

shall recommend to the appeal board that such objections be not sustained. The appeal board shall, in making its decision, give consideration to, but shall not be bound to follow, the recommendation of the Department of Justice together with the record on appeal from the local board. Each person whose claim for exemption from combatant training and service because of conscientious objections is sustained shall be listed by the local board on a register of conscientious objectors.

3. The Selective Service Regulations, 32 C.F.R. (1949 ed.), Part 1626.25, provide:

(c) The Department of Justice shall * * * make an inquiry and hold a hearing on the character and good faith of the conscientious objections of the registrant. The registrant shall be notified of the time and place of such hearing and shall have an opportunity to be heard. If the objections of the registrant are found to be sustained, the Department of Justice shall recommend to the appeal board (1) that if the registrant is inducted into the armed forces, he shall be assigned to noncombatant service, or (2) that if the registrant is found to be conscientiously opposed to participation in such noncombatant service, he shall be deferred in Class IV-E. If the Department of Justice finds that the objections of the registrant are not sustained, it shall recommend to the appeal board that such objections be not sustained.

(d) Upon receipt of the report of the De-

partment of Justice, the appeal board shall determine the classification of the registrant, and in its determination it shall give consideration to, but it shall not be bound to follow, the recommendation of the Department of Justice. The appeal board shall place in the Cover sheet (SSS Form No. 101) of the registrant both the letter containing the recommendation of the Department of Justice and the report of the Hearing Officer of the Department of Justice.

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